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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR HERCULES,

Defendant and Appellant.

B285740

(Los Angeles County
Super. Ct. No. BA450879)

APPEAL from a judgment of the Superior Court of Los Angeles County, David V. Herriford, Judge. Judgment affirmed; remanded for resentencing.

Laurel Ellis Parker Simmons, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Stephanie C. Santoro, Deputys Attorney General, for Plaintiff and Respondent.

By information, appellant Oscar Hercules was charged with one count of assault with a deadly weapon (a knife). (Pen. Code, § 245, subd. (a)(1).)¹ It was further alleged that appellant had two prior “strike” convictions for purposes of the “Three Strikes” law (§§ 667, subds. (b)-(j), 1170.12), which were also five-year serious felony prior convictions (§ 667, subd. (a)(1)): a 2012 criminal threat conviction (§ 422) and a 2014 conviction for a felony attempt to dissuade a victim or witness from making a report (§ 136.1, subd. (b)(1)).

At trial a jury found appellant guilty of assault with a deadly weapon. After appellant waived his right to a jury trial on the prior conviction allegations, the trial court found them to be true as well, such that appellant had two prior strike convictions, which were also prior serious felonies under section 667, subdivision (a)(1). After striking one strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the court sentenced appellant to a total of 16 years in state prison: the middle term of three years, doubled under the Three Strikes law, plus 10 years for the two section 667, subdivision (a) priors. Appellant timely appealed.

FACTUAL SUMMARY

At about 3:40 p.m. on October 9, 2016, 15-year-old Guadalupe R. was at home with two friends when she heard banging. Thinking it was her brother, she walked outside and saw a man she later identified as appellant banging and waving a knife while saying, “la niña, la niña.” He was about five feet away and aimed the tip of the knife at her. She locked herself inside and called her friends who got a hammer and a knife and asked appellant what he was doing. He continued to say “la niña” and, in Spanish, told them a girl was injured on her knee and needed an ambulance. Appellant left the yard, paced back and forth in the alley, and stood on a wall, pointing, repeating “la niña,” and talking about a girl.

¹ All undesignated statutory references are to the Penal Code.

Both Guadalupe and her brother called 9-1-1 and described appellant.² Responding police officers saw a man matching the description running through an alley, and then an unidentified person called 9-1-1 to report a man with a knife nearby. When an officer arrived at that location, he saw appellant on the roof of a four-story building. After about five minutes, appellant jumped from the roof, landing on some thick brush, and was arrested.

DISCUSSION

Initially, appellant's court-appointed appellate counsel filed an opening brief requesting our independent review of the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant was informed of his right to file a supplemental brief, but he did not do so. Then, on September 30, 2018, while this appeal was pending, the Governor signed Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), which amends sections 667, subdivision (a)(1) and 1385, subdivision (b), effective January 1, 2019, to give courts discretion to dismiss or strike five-year enhancements under section 667, subdivision (a). Appellate counsel subsequently requested the opportunity to file supplemental briefing, contending this case should be remanded for resentencing pursuant to SB 1393. We granted the request and have now received the parties' briefing on this issue.³ We conclude that remand for resentencing based on SB 1393 is appropriate in this case.

As we have noted, the trial court found that appellant had two prior serious felony convictions (§ 667, subd. (a)) and imposed two consecutive five-year terms based on these enhancements. Effective January 1, 2019,

² Both identified Hercules in court as the man they saw that day.

³ In his December 11, 2018 letter brief, the Attorney General asserted that appellant's claim was not ripe before the statutory amendment's effective date of January 1, 2019. Of course, as of January 1, 2019, the amendment is now effective. The Attorney General otherwise agrees that SB 1393 applies retroactively to appellant and that remand is appropriate in this case.

SB 1393 deleted former subdivision (b) of section 1385 which precluded the trial court from striking a five-year enhancement for a prior serious felony conviction under section 667, subdivision (a). With the deletion of subdivision (b) of section 1385, the trial court now has discretion to strike section 667, subdivision (a) enhancements. At the time of appellant’s sentencing, the trial court had no such discretion.

Because appellant’s case was not final before the effective date of SB 1393 (January 1, 2019), he is entitled to the ameliorative effect of this enactment.⁴ The question is whether remand is warranted. In the analogous context of recent amendments to sections 12022.5 and 12022.53, which granted trial courts the discretion to strike firearm enhancements, courts have held that remand is required “unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court’s intent, remand is required when the trial court is unaware of its sentencing choices.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

Here, there is no such indication in the record, and the Attorney General concedes that remand is appropriate.⁵ We agree and remand the case for the trial court to exercise its discretion whether to strike or dismiss either, both, or neither prior serious felony conviction under section 667, subdivision (a).

⁴ “A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired.” (*People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.) The time to file a petition for certiorari expires 90 days after our opinion is filed — longer, if the defendant files a petition for review. (U.S. Supreme Ct. Rules, rule 13(1), (3).)

⁵ At sentencing, the trial court struck one of two prior strikes, finding that appellant did not fall within the spirit of the Three Strikes law, while noting that the court had no such authority (at the time) to strike either of the five-year priors under section 667, subdivision (a).

We have independently reviewed the record and find no other arguable issues on appeal.

DISPOSITION

The case is remanded for the trial court to exercise its discretion whether to strike either, both, or neither of the section 667, subdivision (a) enhancements. In all other respects, the judgment is affirmed.

MICON, J.*

We concur:

WILLHITE, Acting P.J.

COLLINS, J.

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.